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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 894

JAMES H. FRIEND, SILAS TROWELL and FLOYD LONG,

Petitioners

versus

TROPIS COMPANY, LTD.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Friend, Trowell and Long pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 11,230, Friend et als v. Tropis Company, Ltd., entered therein on September 11, 1967. This Judgment affirmed a Final Judgment of the United States District Court for the Eastern District of Virginia at Norfolk, adverse to the Petitioners.

I. OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 382 F2d 633. This Opinion is copied in the Appendix to this Petition, pp. 1a through 7a.

II. JURISDICTION

The Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

III. QUESTIONS PRESENTED

1. Where petitioners longshoremen were in vessel's hold trimming cargo and sustained electrical shocks and resulting injuries, was the vessel unseaworthy because neither it nor its cargo were reasonably intended to cause electrical shocks, or were the longshoremen required to show by a preponderance of the evidence (1) the type and kind of electrical shock and (2) from what source or cause the electrical shocks came from, as a prerequisite condition precedent to rendering vessel unseaworthy?

2. If the injuries were caused by "static" electricity, as claimed by the shipowner, were the longshoremen denied their Seventh Amendment jury trial as to unseaworthiness, when the District Court removed this from jury consideration by charging the jury that no recovery could be rendered for "static" electricity causing injuries?

IV. STATEMENT

Petitioners longshoremen Friend, Trowell and Long, while working in the bottom hold of No. 2 hatch of the Greek steamship AVRA, at Norfolk, Virginia, sustained

electrical shocks and resulting injuries while trimming the potash cargo of the vessel. They filed this diversity action against the shipowner respondent Tropis Company, Ltd., on the grounds of negligence and unseaworthiness of the vessel. On the completion of the opening statement of shipowner's counsel that the longshoremen had indeed sustained electrical shocks, classified as "static" electricity, plaintiffs' counsel moved for a directed verdict on the grounds that shipowner's counsel had admitted liability as to unseaworthiness.

Notwithstanding, the Court denied the Motion. Testimony was then presented showing that the longshoremen had, while trimming potash cargo in the No. 2 hold of the vessel, sustained electrical shocks. Two of the men were taken to the hospital and all three of the men received medical care for various lengths of time. Upon the completion of all of the evidence, petitioners again moved for directed verdict on the grounds of unseaworthiness, which was denied by the Court and the case was submitted to the jury. The Court charged the jury that there was no dispute concerning the plaintiffs' sustaining electrical shocks nor evidence to the contrary (App. 7a).

However, the Court charged that there was no liability on the ship if the longshoremen's electricial shocks and resulting injuries were caused by "static" electricity and the vessel would only be liable if they showed that the electrical shocks were caused by bad wiring or bad electrical system of the ship. Counsel for the longshoremen objected and excepted to the Court's charge on the grounds that the vessel was unseaworthy as a matter of law since its hold and cargo was not reasonably intended to be charged with electricity, whether "static" or from

some other source or type or kind of electricity. Petitioners sought to show that the electrical shocks were due to bad, exposed and broken electrical wires in No. 2 hatch where the men were working, causing stray electrical currents in the steel stanchions and parts of the hold. The shipowner contended that the electrical shocks and resulting injuries to petitioners were due to "static" electricity in working the cargo.

The testimony revealed that on November 1, 1963, the three longshoremen started work in No. 2 hold of the vessel trimming the potash cargo at 8:00 in the morning and they continuously worked all that morning until the lunch period at 12:00 p.m., without incident. There were no electrical shocks of any kind emanating from either the ship or the cargo. At 1:00 p.m., the men went back to work in the No. 2 hold, trimming the potash cargo. When the potash started sliding in the hold, Trowell grabbed a stanchion in the vessel and received an electrical shock and, "I didn't know anything for a second, two or three seconds." Longshoreman Long stated, " . . . and I was close up to the wing and was shoveling down. I was slipping down, and I grabbed on to this beam of the ship. This is where I got shocked there." Longshoreman Friend stated that at about the same time he had grabbed hold of a beam and sustained an electrical shock. Work was thereafter immediately stopped, the men were taken out of the hold and the hatch was not worked the rest of the day. The ship's electrician came down and grounded the ladder so the men could get out of the vessel. Friend stated that he had seen the electrical wires in the bulkhead and they had been battered and bent up and exposed and looked as if they had been spliced. The bent and mashed wires were also reported by the shipowner's surveyors who came aboard the ship after the incident to

ascertain the cause of the electrical shocks, although it was denied that these broken wires were the cause of the stray electrical currents in the hold. It was undisputed that neither electrical shocks nor "static" electricity had ever been known to occur in working potash cargo and indeed these electrical shocks had not occurred while working the same cargo during the morning period 8:00 a.m. to 12:00 p.m. on the day petitioners were injured at approximately 1:30 p.m. Two of petitioners were hospitalized for electrical shock and all three were under medical care for various periods of time.

The completion of discharge of potash cargo from No. 2 hold of the vessel was not made until November 6, five days after the men had been shocked. On November 5, 1963, four days after this incident, the shipowner had its surveyors aboard the vessel to determine the cause of the electrical currents. The circuits on the panel board between No. 1 and No. 2 cargo holds were checked and three were found very poorly insulated. These experts claimed that the men had sustained "static" electrical charges which in some mysterious way built up in their bodies and suddenly decided to become discharged in the lower hold of No. 2 hatch of the steamship AVRA, causing these longshoremen to be injured. There was never any dispute that the men had sustained electrical shocks. The only dispute in the evidence was whether it was "static" electricity or some other kind or whether the electrical charges emanated from the ship's bad wiring system. The shipowner's expert conceded that "static" electrical charges resemble lightning in some respects and are highly dangerous (App. 10a). Whatever the kind of electrical current, without conflict, all evidence showed the longshoremen were injured from electrical shock, requiring medical attention.

The District Court removed the shipowner's factual contention, as a ground for the longshoremen's recovery from the jury by charging them that the longshoremen could not recover unless they proved the source of the electrical charges as being the bad wiring. The jury rendered a verdict against them and in favor of the shipowner.

Following the reasoning of the District Court, the Court of Appeals affirmed, stating "as electricity indubitably was the cause of their injuries, the next question was its source" (App. 2a), fully approving the District Court's holding that if the electrical shock was caused by static electricity, there was no liability for unseaworthiness. The District Court's denial of the longshoremen's Motion for Directed Verdict was proper, so holds the Court of Appeals, since it would have foreclosed the ship's defense "on the issue of responsibility for the static electricity" (App. 4a). While approving of the District Court's withdrawal of the static electricity issue from the jury as grounds for unseaworthiness, yet later in its Opinion the Court of Appeals stated that "the plaintiffs were not precluded from relying on this evidence" (App. 5a). While holding that the electrical charges which injured the longshoremen were beyond the control of the shipowner, the Court of Appeals absolves the shipowner of any responsibility therein because the unseaworthiness was created by factors beyond the shipowner's control and because the longshoremen had failed to show that the electrical charges were caused either by bad wiring or static electricity to allow a recovery for unseaworthiness.

V. REASONS FOR GRANTING THE WRIT

There is a clear and direct conflict in principle between the decision of the Court of Appeals in this action and the decisions of this Court in *Mitchell* v. *Trawler-Racer,* 362 U. S. 539, and *Alaska S.S. Co.* v. *Petterson,* 347 U. S. 396. In Mitchell the seaman was injured when he stepped on the ship's rail covered with slime and fish gurry apparently remaining there from the earlier unloading operations. Both the District Court and the Court of Appeals had held that the seaman must prove knowledge of this condition and an opportunity to remedy it before he could recover for this transitory unseaworthy condition, and the question presented to this Court was whether or not the liability of the shipowner for transitory unseaworthiness was limited by concepts of common law negligence as to knowledge and due care.

This Court stated, 362 U. S. 548, 549:

> In *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 90 L.ed. 1099, 66 S.Ct. 872, the Court effectively scotched any doubts that might have lingered after Mahnich as to the nature of the shipowner's duty to provide a seaworthy vessel. The character of the duty, said the Court, is "absolute." "It is essentially a species of liability without fault, analogous to other well-known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character . . . It is a form of absolute duty owing to all within the range of its humanitarian policy." 328 U. S., at 94, 95. The dissenting opinion agreed as to the nature of the shipowner's duty . . . "(D)ue dili-

gence of the owner," it said, "does not relieve him from this obligation." 328 U. S. at 104.

The decision of the Court of Appeals here dilutes the warranty of seaworthiness with the prerequisite condition of showing common-law negligence and places the heavy burden on the petitioners to show the source of the electrical shocks plus fault of the shipowner. In so deciding, this decision clearly conflicts with the principles laid down by this Court in the Mitchell case. Further the Court below in approving the District Court's charge to the jury that static electricity could not in law render the vessel unseaworthy, vaguely concludes that the District Court "may have intended merely to withdraw the issue from the jury for inadequate evidence" (App. 4a). Overlooked completely are the undisputed facts that two of the petitioners were hospitalized and all three required medical treatment for injuries diagnosed by the doctors as being caused by electrical shocks. This evidence in itself was inference enough that the injuries were caused by electricity, whether "static" electricity, as contended by the shipowner, or electricity caused by bad wiring. Obviously neither the hold of the vessel nor its cargo while charged with electricity of any kind is reasonably fit for its intended use nor a safe place in which petitioners could work. Where the evidence is undisputed as to the unsafe or unseaworthy condition, it follows that unseaworthiness from such evidence is a conclusion of law and reviewable as such. *Sprague* v. *Texas Co.*, 250 F2d 123, 124 (2d Cir. 1957); *Van Carpels* v. *AMERICAN HARVESTER*, 297 F2d 9, 12 (3d Cir. 1961); *Mills* v. *Mitsubishi Shipping Co.*, 358, F2d 609 (5th Cir. 1966); *Thorson* v. *Inland Navigation Co.*, 270 F2d 432 (9th Cir. 1959); *Crescent Wharf & Warehouse* v. *Compania*, etc., 336 F2d 714 (9th Cir. 1966); *Amador*

v. *A/S J. Ludwig Mowinckels Rederi*, 224 F2d 437 (2d Cir. 1955).

The Court of Appeals here concludes that static electricity, for which the District Judge charged the jury there was no liability, did not make the vessel unseaworthy even though in the regular course of work these longshoremen sustained injuries from electrical shocks never intended to be present in either the hold or the cargo. We do not think reasonable safety can be equated with risks of electrical shocks. We think the longshoremen sustained their burden of proof when they showed they sustained electrical shocks and resulting injuries, all of which was never reasonably intended to occur as a part of their work in the ship's hold. Therefore this decision imports negligence concepts into the warranty of seaworthiness, which has been prohibited by this Court.

The Court of Appeals further holds that the District Court was right in denying the longshoremen's Motion for Directed Verdict in charging that there was no responsibility if the shocks were caused by the static electricity, saying that otherwise, it would have foreclosed the ship's defense on the issue of responsibility for the static electricity (App. 4a). This holding conflicts in principle with the holding of this Court in *Alaska S.S. Co.* v. *Petterson*, 347 U. S. 396, affirming *Petterson* v. *Alaska S.S. Co.*, 205 F2d 478 (1953), holding that the shipowner could not evade its responsibility for unseaworthiness by showing that it had no control or direction over the causes of the unseaworthiness. See also *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 100.

Illustrating the conflict of the Court of Appeals' decision here with the foregoing decisions of this Court, is the correct decision of the Second Circuit in *Van Car-*

pals v. *The S. S. AMERICAN HARVESTER*, 297 F2d 9, (1961), where steam and hot water gushed forth from the valve, burning a shore repairman. No one could explain what caused the steam to cause the bonnet of the pipe to come off, since the shipowner proved that there was no undue pressure on the line. The trial judge even stated, "This appears to be the type of unexplained accident for which liability cannot be predicated on negligence," and since the shipowner's evidence showed an absence of pressure, he held the vessel was not unseaworthy. The Second Circuit reversed, and Judge Clark stated as follows, regarding the unseaworthiness of the vessel:

> We disagree and hold that under prevailing law the vessel must be held unseaworthy. Though the cause of the accident may be inexplicable, yet it, and the way it occurred, demonstrated that the valve was actually not in a safe condition for the work needed to be done upon it. The trial court believed that the independent tests made to double check the gauges and the fact that libelant saw no signs of pressure negated an unseaworthy condition. But we do not think that follows. The accident occurred; there was steam in the valve; and it erupted. These conceded physical facts imperatively required a finding of unfitness for the task in hand. Thus a conclusion of unseaworthiness should have been reached irrespective of the proofs tending to absolve the owner of negligence.

Thus the situation falls within the "absolute" duty of the shipowner to furnish a seaworthy ship which "is essentially a species of liability without fault, analogous to other well-known instances in our law." *Seas Shipping Co.* v. *Sieracki*, 328

U. S. 85, 94, 66 S. Ct. 872, 90 L.Ed. 1099, quoted in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 549, 80 S. Ct. 926, 932, 4 L.Ed. 2d 941, which has now settled the law we must apply. The Mitchell case points out that since Seiracki the Court's decisions "have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care"; that it applies equally to a condition arising after the vessel leaves her home port as before, or to one which may be only temporary; that it applies to defective equipment temporarily brought on board by an independent contractor over which the owner had no control; and that the latter's actual or constructive knowledge is not essential to his liability. "What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history." 362 U. S. 539, 549, 550, 80 S.Ct. 933. See also *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 327, 81 S.Ct. 6, 5 L.Ed. 2d 20, and our own decision in *Sprague* v. *The Texas Co.*, 2 Cir., 250 F2d 123.

It thus appears clear to us that the shipowner cannot wipe out this "absolute" duty by saying that he does not know what caused the particular accident or suggesting in effect that it was an act of God.

297 F2d 11.

Finally, the Court of Appeals here approved of the District Court's action in removing from jury consideration, the shipowner's evidence as to static electricity caus-

ing the injuries as a ground for unseaworthiness, by telling the jury that no recovery could be given the longshoremen on this ground. The District Court's charge had the effect of therefore removing from jury consideration part of the evidence which they had a right to consider. We feel that this action as approved by the Court of Appeals denied the longshoremen their jury trial of all of the issues if it could be considered that there was any dispute as to unseaworthiness. But yet again this brings us back to placing the burden on these longshoremen of proving negligent fault and cause of an unseaworthy condition which this Court has declined to place upon them.

VI. SUMMARY AND CONCLUSION

We think that the decision of the Fourth Circuit Court of Appeals in petitioners' case is in clear, direct and substantial conflict in principle with the decisions of this Court in *Mitchell* v. *Trawler Racer, Inc.* 362 U. S. 539, and *Alaska S.S. Co.* v. *Petterson,* 347 U. S. 396, making it of utmost importance that this Court review the decision of the Court of Appeals in petitioners' case, since this decision tends to create uncertainty as to the rights of all similar litigants. Additionally, the decision is plainly wrong and a mistake has been made.

Under the circumstances of this case and in view of the clear conflict, summary action by this Court would be appropriate and all that is required to remedy the conflict and correct the mistake. *Mascuilli* v. *U.S.*, ___ U.S. ___, 18 L.Ed. 2d. 743 (No. 274, May 22, 1967); *Albanese* v. *N. V. Nederl,* etc., 382, U. S. 283 (1965).

Wherefore petitioners respectfully pray that this petition be granted and that a Writ of Certiorari issue,

and that this Honorable Court review the decision of the Court of Appeals and that it may be reversed, entering judgment as a matter of law for the petitioners on the grounds of unseaworthiness, with remand for jury trial as to damages only.

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